**Not To Be Published:**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF IOWA**
**CENTRAL DIVISION**

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>DARCY JAY BETTERTON,<br><br>Defendant. | No. CR03-3014-MWB<br><br>**ORDER REGARDING MAGISTRATE'S REPORT AND RECOMMENDATION CONCERNING DEFENDANT'S MOTION TO SUPPRESS** |

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## *I. INTRODUCTION AND BACKGROUND*

### *A. Procedural Background*

On February 20, 2003, a three-count indictment was returned against defendant Darcy Jay Betterton charging him with possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 851, possessing cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 851, and possessing marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), and 851. On October 6, 2003, defendant Betterton filed a motion to suppress. In his motion, defendant Betterton seeks to suppress evidence seized from the automobile in which he was driving pursuant to an inventory search. Defendant Betterton's motion to suppress was referred to United States Magistrate Judge Paul A. Zoss, pursuant to 28 U.S.C. § 636(b). On November 21, 2003, an evidentiary hearing was held. On November 24, 2003, Judge Zoss filed a Report and Recommendation in which he recommends that defendant Betterton's motion to suppress be denied. Judge Zoss concluded that the police lawfully impounded the automobile driven by defendant Betterton and then conducted a lawful inventory search. Judge Zoss, therefore, recommended that defendant Betterton's motion to suppress be denied.

Defendant Betterton has filed both factual objections to Judge Zoss's Report and Recommendation, as well as objections to the legal conclusions reached by Judge Zoss in his Report and Recommendation. The court, therefore, undertakes the necessary review

of Judge Zoss's recommended disposition of defendant Beterton's motion to suppress.

### *B. Factual Background*

In his Report and Recommendation, Judge Zoss made the following findings of fact:

> On November 20, 2002, Officer Jason Fett of the Carroll, Iowa, Police Department saw a red 1992 Pontiac driving on Grant Road in Carroll. He noticed the vehicle had a crack in the windshield that passed directly in front of the driver's line of sight and continued across the entire windshield. Officer Fett pulled the vehicle over at 3:36 p.m., in approximately the 900 block of Grant Road, intending to cite the driver for the equipment violation. The vehicle's occupant identified himself as Betterton, and stated he did not have a driver's license because his license had been suspended. He provided his date of birth so Officer Fett could verify his license status. Betterton stated the car was owned by his girlfriend, Pam Jones, and he had taken the car while Jones was sleeping.
>
> Betterton waited in the Pontiac while Officer Fett returned to his patrol car to check on Betterton's driver's license status. While he was waiting for the dispatcher to call him back, Officer Fett called Officer Fleecs and asked him to come to the scene to assist in the traffic stop. Officer Fett testified he planned to arrest Betterton for driving under suspension, and he planned to have the vehicle towed because it was pulled over in a "no parking" zone and would be a safety hazard if left in that location. Officer Fett testified the decision to impound the vehicle was solely within his discretion, and there was no written departmental policy specifying the circumstances when vehicles could or should be impounded.
>
> When Officer Fleecs arrived at the scene, Officer Fett asked Betterton to step out of the Pontiac and walk to the rear

of the car. The officer placed Betterton under arrest at 3:54 p.m., patted him down for weapons, and put him into the back of his patrol car. He drove Betterton to the Carroll police station, where Betterton was booked for driving under suspension, and a repair notice was issued for the windshield. Betterton tried to contact a couple of people to come pick him up and pick up the vehicle, but was unable to reach anyone. After he signed the citation and repair notice, Betterton was released.

Officer Fleecs had remained at the scene of the traffic stop to await the arrival of the tow truck. The standard procedure of the Carroll Police Department is to tow impounded vehicles to a secure bay at the police station for purposes of an inventory search. In accordance with that procedure, the Pontiac was towed to the secure bay. The Carroll Police Department has a written policy concerning the inventory of impounded vehicles. *See* Gov't Ex. 2. The written policy requires all impounded vehicles to be inventoried completely. The policy provides, *inter alia*, "The inventory shall be written and shall include all articles and containers in the vehicle, and shall include a list of the contents of each container in the vehicle. Each container shall be opened unless the contents of a particular container are evident from its exterior." *Id.*

Pursuant to this policy, Officers Fett and Fleecs began to inventory the contents of the Pontiac. In the back seat, the officers located a black bag similar to a computer or laptop bag. Officer Fleecs unzipped the bag, and found another zipped bag inside. Officer Fleecs unzipped the second bag and located a quantity of drugs. At that point, Officer Fett left to prepare a warrant for Betterton's arrest for possession of a controlled substance with intent to deliver, while Officer Fleecs completed the inventory of the vehicle.

Both of the officers testified that prior to the traffic

> stop, they had never encountered Betterton previously, and they knew nothing about prior encounters he may have had with law enforcement. Officer Fleecs recalled hearing Pam Jones's name before in connection with a charge for possession of drug paraphernalia, and he mentioned at the scene of the traffic stop that a warrant had been issued for Jones. Officer Fleecs was not involved in Jones's case, but had heard about it from another officer.
>
> Both officers also testified that prior to finding the black bag in the back seat of the vehicle, they never thought the investigation related to anything more than a routine traffic stop.
>
> At some point before the inventory was commenced, an individual named Dana Marie Vonnahme arrived at the Carroll police station to pick up the Pontiac. She did not have money to pay the tow bill, and she was not the registered owner of the vehicle. Officer Fett told Vonnahme that he had to inventory the vehicle pursuant to departmental policy before it would be released.

Report and Recommendation at pp. 2-4 (footnotes omitted). Upon review of the record, the court adopts all of Judge Zoss's factual findings that have not been objected to by defendant Betterton.

## *II. LEGAL ANALYSIS*

### *A. Standard Of Review*

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

> A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the

> court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). As noted above, defendant Betterton has filed objections to Judge Zoss's Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Betterton's Motion To Suppress.

### *B. Objections To Findings Of Fact*

#### *1. Decision to impound car*

Defendant Betterton initially objects to Judge Zoss's finding that: "Officer Fett testified that he planned to arrest Betterton for driving under suspension, and he planned to have the vehicle towed because it was pulled over in a 'no parking' zone and would be a safety hazard if left in that location." Report and Recommendation at 2. Defendant Betterton objects to this factual finding because the officers did not attempt to otherwise secure the car or to locate a responsible party to take custody of the car. Defendant Betterton argues that because these options were not pursued "creates a strong suggestion that the impound was primarily done in order to perform the inventory." Defendant's Objections at 2-3. The uncontested record is that Carroll Police Officer Jason Fett decided to have the automobile defendant Betterton was driving towed because the location where it was parked created a traffic hazard. Tr. at 14. The court disagrees with defendant

Betterton that Officer Fett's decision to have a vehicle towed that was deemed to be a traffic hazard creates an inference that the vehicle was towed as a pretext for conducting an inventory search. Therefore, this objection is denied.

***2. Ability to protect vehicle***

Defendant Betterton next objects to Judge Zoss's finding that: "neither [defendant Betterton] nor the vehicle's owner was present and available to protect the vehicle and its contents, or to make arrangements to have the vehicle moved." Report and Recommendation at 6. Defendant Betterton objects to this finding because defendant Betterton was not given an opportunity to avoid impoundment of the car. This objection, however, is not to an actual factual finding of Judge Zoss but rather to a statement in the report and recommendation where Judge Zoss distinguished the facts of this case from those found in *United States v. Bridges*, 245 F. Supp. 2d 1034 (S.D. Iowa 2003) (finding an impoundment and the resulting inventory search violated the Fourth Amendment because police department impoundment guidelines did not cover the circumstances of the case; defendant was free to secure the vehicle, and it was parked in a store's parking lot and did not pose a safety hazard). The facts of this case are clearly distinguishable from those in *Bridges*. In *Bridges*, police officers stopped a vehicle being driven by the defendant in the parking lot of a gas station/store, for an improper rear lamp and violation of seat belt requirements. The officers decided to impound the vehicle when they learned that neither the defendant nor his passenger had a valid driver's license. *Id.* at 1035. The defendant in *Bridges* was not arrested and his car was parked off the roadway in a commercial parking area. *Id.* Thus, the defendant in *Bridges* and a passenger were available to protect the vehicle and its contents. Moreover, the police department's written policy concerning impoundment, which allowed impoundment when the driver was arrested, when a serious accident had occurred, or when the vehicle was parked or

abandoned on the traveled portion of a roadway, was not followed in *Bridges*. *Id.* at 1037. Therefore, this objection is denied.

***3. Time narcotics investigation commenced***

Defendant Betterton also objects to Judge Zoss not including a factual finding that a narcotics investigation of defendant Betterton commenced prior to the time of the traffic stop. Both Officer Fett and Officer Fleecs testified that they first commenced a drug investigation of defendant Betterton when they found the bag containing drugs in the car during the inventory search. Tr. at 37 and 48. Indeed, both officers testified that they did not know who defendant Betterton was at the time that he was stopped. Tr. at 11 and 43. Therefore, this objection is denied.

***4. Officers leaving the scene***

Defendant Betterton next objects to Judge Zoss not including a factual finding that the testimony of the officers contradicted the transcript of the videotape with respect to whether both of the officers left the scene before the tow truck arrived. Officer Fett testified that he left the scene before the tow truck arrived but that Officer Fleecs stayed behind to wait for the tow truck. Tr. at 29. Officer Fleecs testified that he did stay at the scene until the tow truck arrived. Tr. at 48. The transcript of the videotape of the traffic stop does not contradict the officers testimony. Therefore, this objection is denied.

***5. Credibility of officers***

Defendant Betterton finally object to Judge Zoss's failure to properly assess the credibility of the officers. Defendant Betterton directs the court's attention to the fact that the officers edited the transcript of the videotape of the traffic stop and that Officer Fett's microphone was not on during the entire traffic stop. With respect to the former, the court finds nothing untoward in the officers editing of the transcript of the videotape of the traffic stop. Defendant Betterton has not directed the court to any discrepancies in the

officers translation of the videotape and the court's own review of the videotape reveals none. Similarly, Officer Fett disclosed at the evidentiary hearing that his body microphone was not turned on when he initially approached the car in which defendant Betterton was driving. Tr. at 26. Officer Fett's failure to turn on his body microphone at the start of the traffic stop does not reveal the type of improper behavior which would ref1ect disparagingly on his credibility as a witness in this case. Therefore, this objection is denied.

### *C. Objections To Conclusions Of Law*

#### *1. Lawful impoundment of car*

Defendant Betterton initially objects to Judge Zoss's legal conclusion that the car defendant Betterton was driving was lawfully impounded pursuant to Carroll Police Department policy. The validity of impoundment is judged under Fourth Amendment reasonableness standards. *United States v. Haro-Salcedo*, 107 F.3d 769, 770- 72 (10th Cir. 1997); *see United States v. Agofsky*, 20 F.3d 866 (8th Cir. 1994) (Fourth Amendment does not require police to allow arrested person to arrange for another person to pick up arrested person's car to avoid impoundment and inventory). Police may impound cars when in performance of their community caretaking functions. *See South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). An impoundment comports with Fourth Amendment standards if done in the exercise of those functions or is otherwise supported by probable cause. *See United States v. Duguay*, 93 F.3d 346, 352 (7th Cir. 1996) (citing *Opperman*, 428 U.S. at 370 n.5) ("An impoundment must either be supported by probable cause, or be consistent with the police role as 'caretaker' of the streets and completely unrelated to an ongoing criminal investigation.").

Courts have held that an impoundment is reasonable when the driver of an

automobile cannot lawfully operate the vehicle and there is no third person who can immediately take custody of it. *See United States v. Hunnicutt*, 135 F.3d 1345, 1351 (10th Cir. 1998); *see also Haro Salcedo*, 107 F.3d at 771 (holding that impoundment reasonable where defendant could not provide proof of ownership, his license plates matched different vehicle, and he was being arrested); *United States v. Johnson*, 734 F.2d 503, 505 (10th Cir. 1984) (holding that an impoundment is justified when police are concerned about vandalism and the owner is clearly unable to drive); *United States v. Velarde*, 903 F.2d 1163, 1166-67 (7th Cir. 1990) (impoundment reasonable where neither occupant had valid license, owner not available, and car located on highway); *United States v. Brown*, 787 F.2d 929, 932 (4th Cir.) (impoundment reasonable where car's occupants appeared drunk, no known sober person was available to take custody, and the car, if left unattended, could present a nuisance), *cert. denied*, 479 U.S. 837 (1986); *United States v. Duncan*, 763 F.2d 220, 224 (6th Cir. 1985) (impoundment of vehicle reasonable after arrest of driver on public highway); *United States v. Griffin*, 729 F.2d 475, 480 (7th Cir.) (impoundment reasonable where neither occupant of car could legally remove it from emergency lane of highway and leaving car there would present hazard and theft risk), *cert. denied*, 469 U.S. 830 (1984). In the instant case, the evidence showed that defendant Betterton was unable to drive the car because he was under arrest, no one was immediately available to drive the car, and that the car was parked in a no parking zone thereby creating a public safety hazard. Under these circumstances, the court concludes that the impoundment was justified by and the officers' caretaking responsibilities. *Opperman*, 428 U.S. at 369 ("The [inherent] authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge") (plurality opinion)).

Defendant Betterton contends that the impoundment was not solely related to the officers' caretaking function or for public safety purposes. The evidence, however, shows

that the decision to hold the car for investigative purposes was made only after the officers found drugs during the inventory search of the vehicle. At the time the officers decided to have the car impounded for towing, their only purpose was to get the car off the street. Thus, the court concludes that the impoundment was justified for public safety and caretaking purposes, and that the impoundment of the car was reasonable under the Fourth Amendment. Therefore, this objection is denied.

***2. Lawful inventory of car***

Defendant Betterton next objects to Judge Zoss's legal conclusion that the officers conducted a lawful inventory search of the car. Defendant Betterton asserts that Judge Zoss failed to consider the totality of the circumstances in assessing the validity of the inventory search.

In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the United States Supreme Court held that an inventory of a lawfully impounded automobile, where conducted pursuant to standard police procedures, is not unreasonable under the Fourth Amendment. *Id*. at 376. In *Opperman*, the Court identified three state interests which supported an inventory search: "the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger." *Id*. at 369 (citations omitted). "The central inquiry in determining whether such an inventory search is reasonable is a consideration of the totality of the circumstances." *United States v. Hartje*, 251 F.3d 771, 775 (8th Cir . 2001); *United States v. Marshall*, 986 F.2d 1171, 1174 (8th Cir. 1993).

An inventory search must be conducted according to standardized criteria. *Colorado v. Bertine*, 479 U.S. 374-75 (1987); *see United States v. Rowland*, 341 F.3d 774 (8th Cir.) (noting that "Inventory searches are reasonable if 'conducted according to

standardized police procedures, which vitiate concerns of an investigatory motive or excessive discretion.'") (quoting *Opperman*, 428 U.S. at 369), *cert. denied,* ___S. Ct. ___, 2003 WL 22922284, 72 U.S.L.W. 3407 (Dec. 15, 2003); *United States v. Mayfield*, 161 F.3d 1143, (8th Cir. 1998) (holding that "Inventory searches are reasonable when they are conducted according to standardized police procedures."), *cert. denied*, 526 U.S. 1045 (1999). The Carroll Police Department has standardized criteria that governs the inventory of all impounded vehicles.[1] The Carroll Police Department's policy regarding

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[1]The Carroll Police Department's policy on vehicle inventories is as follows:

> It is the policy of the Carroll Police Department that all motor vehicles which are impounded or otherwise taken into lawful custody shall be completely inventoried. The inventory shall be written and shall include all articles and containers in the vehicle and shall include a list of contents of each container in the vehicle.
>
> Each container shall be opened unless the contents of a particular container are evident from its exterior. If keys, a locksmith, or other means of access are not reasonably available to the officer, the officer is authorized to break locks to gain access to the vehicle, its locked compartments, or its locked containers.
>
> The inventory shall further include a notation of any parts of the vehicle which appear to be missing or damaged.
>
> The purpose of this policy is to ensure the safe return of the property to its lawful owner and to resolve questions regarding the condition of contents of the vehicle.
>
> Motor Vehicles and their contents shall be secured in an

(continued…)

inventorying of motor vehicles mandate that an inventory of a vehicle, including all compartments and containers, be completed. Law enforcement witnesses testified that they performed the inventory search according to routine police department procedure. The policy removes any discretion in determining both whether to search and the scope of the search and thus meets the requirements of a standardized procedure. There is no evidence that the officers failed to follow the standardized procedure. Furthermore, the policy justifications for allowing comprehensive inventory searches are present here. The police

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[1](…continued)

> appropriate facility for safe keeping until returned to their rightful owners. Any charges stemming from lawful impoundment of such vehicles will be paid by the owner or his designee before the vehicle is released. All officers shall follow the provisions of Iowa Code Chapter 809 with regard to the disposition of seized property. When such property is no longer required as evidence or for use in an investigation and is otherwise properly identified for return to its owner, then the property can be returned to its' rightful owner. If the owner of the property cannot be determined of if there is more than one person making a claim to the property, then the procedure specified in Iowa Code 809 shall be followed. In no event is property, the possession of which is prohibited by law, to be returned to a person claiming ownership.
>
> An inventory pursuant to this policy shall be completed as soon as practical after the motor vehicle is impounded.
>
> This policy is not intended to limit an officer's authority to search a vehicle under other lawful circumstances such as plain view of contraband, by consent, by authority of a search warrant, etc.

Gov't Ex. 2.

had a legitimate interest in protecting themselves against claims of theft and protecting the vehicle's owner and the contents of the vehicle from damage or theft. *See Opperman*, 428 U.S. at 369. Accordingly, the court finds that law enforcement conducted a legitimate and lawful inventory search of the car and the evidence seized is therefore admissible. Therefore, this objection is also denied.

## *III. CONCLUSION*

The court, upon a *de novo* review of the record, concludes that neither the impoundment nor the search of the car violated the Fourth Amendment and therefore accepts Judge Zoss's Report and Recommendation and **denies** defendant Betterton's Motion To Suppress.

**IT IS SO ORDERED.**

**DATED** this 20th day of January, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA